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No. 98-1979

In the Supreme Court of the United States

WALTER D. SMALL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 10 U.S.C. 616 or 617 bars the Air Force from using a panel system in conducting the evaluative and deliberative phases of selection boards which recommend officers for promotion.

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OPINIONS BELOW

The opinion of the court of appeals in *Small* (Pet. App. A1- A12) is reported at 158 F.3d 576. The orders of the court of appeals granting in part petitioner's petition for rehearing and amending its opinion (Pet. App. A14-A15) are not yet reported. The order of the court of appeals in *Neptune* (Pet. App. A13) is not yet reported. The initial opinion of the United States Court of Federal Claims in *Small* (Pet. App. A20-38, A39-A55) and its opinion on reconsideration are reported at 36 Fed. Cl. 43 and 37 Fed. Cl. 149. The opinion of the United States Court of Federal Claims in *Neptune* (Pet. App. A56-A70) is reported at 38 Fed. Cl. 510. The records of proceedings before the Air Force Board for

Correction of Military Records (Pet. App. A71-A130) are unreported.

JURISDICTION

The judgment of the court of appeals in *Small* was entered on October 14, 1998. A petition for rehearing was granted in part on March 12, 1999 (Pet. App. A14-A15). The judgment of the court of appeals in *Neptune* (Pet. App. A13) was entered on November 2, 1998. A petition for rehearing was denied on March 12, 1999 (Pet. App. A16). The combined petition for a writ of certiorari was filed on June 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the military's statutory "up or out" personnel system, an officer twice non-selected or passed over for promotion to the next higher grade is generally subject to mandatory separation. 10 U.S.C. 630-637. The Secretary of the military department concerned convenes "selection boards" to recommend officers for promotion. 10 U.S.C. 611. A selection board "may not recommend an officer for promotion unless– (1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members of the board finds that the officer is fully qualified for promotion." 10 U.S.C. 616(c). A selection board is also required to "submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer * * * and (2) that, in the opinion of a majority of the members of the board, the officers recommended for promotion * * * are best qualified for promotion"

among the officers considered by the board. 10 U.S.C. 617(a).

Since at least 1965, the Air Force has convened officer selection boards that are comprised of subordinate panels. Pet. App. A2, A49, A58; Gov't C.A. Br. 32 (*Small*). During the evaluative and deliberative phases of the selection board proceedings, each panel is assigned a proportionate share of the candidates' personnel records to rank in order of merit based upon the composite score awarded to each record by the panel. Pet. App. A3, A49-A50, A58. Based upon the promotion rate previously selected by the Secretary (see 10 U.S.C. 622), each panel's "best qualified" officers, who are picked by their hierarchical placement within the panel's order of merit, are recommended for promotion. Pet. App. A3-A4, A50-A51, A58-A59.

2. Petitioners were mandatorily retired from the Air Force, as majors, pursuant to 10 U.S.C. 632, after having served on active duty for 20 years and failed upon several consecutive occasions to be selected for promotion to lieutenant colonel. Pet. App. A73, A88-A89, A114-A115, A122-A123.[1] Petitioners filed applications with the Air Force Board for Correction of Military Records (AFBCMR) challenging their promotion pass-overs because, *inter alia*, the Air Force used a panel system in conducting officer promotion boards in alleged violation of 10 U.S.C. 616(c) and 617(a). Pet. App. A71-A82 (Small), A86-A110 (Neptune), A113-A118 (Hoogstra), and A121-A128 (Lorenzen). The AFBCMR denied relief. *Id.* at A83-A84 (Small), A110-A111

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[1] We are advised by the Air Force that petitioners were permitted, at the discretion of the Secretary, to remain on active duty following their initial two pass-overs to fulfill their 20-year pension eligibility requirements.

(Neptune), A119 (Hoogstra), and A129-A130 (Lorenzen).

The United States Court of Federal Claims affirmed in *Small*, Pet. App. A20-A38, and amended its opinion upon reconsideration after permitting petitioner to conduct further discovery, *id.* at A39-A55. The court also affirmed in *Neptune*, which comprised the consolidated appeals of petitioners Neptune, Hoogstra and Lorenzen. *Id.* at A56-A70.

3. The Court of Appeals for the Federal Circuit affirmed both decisions. Pet. App. A1-A13.[2] The court of appeals rejected petitioners' contention that the Air Force's use of panels in officer selection board proceedings violated 10 U.S.C. 616(c) and 617(a). The court explained that those provisions "do not contain any specific methodology that the selection board must use in carrying out its deliberative process." Pet. App. A9. Then, according deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals concluded that the Air Force's panel system reflected a permissible interpretation of Sections 616(c) and 617(a). Pet. App. A8-A9.[3]

The court of appeals denied petitioners' motions for reconsideration, Pet. App. A14-A16, except that it granted petitioner Small's motion for the limited purpose of deleting a paragraph in its opinion concerning

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[2] The two cases were submitted to the same panel and treated as companion cases. The court issued an opinion in *Small* and affirmed in *Neptune* based upon its decision in *Small*. See Pet. App. A1-A12, A13.

[3] The court of appeals also found non-justiciable petitioner Small's contention that his superior officers impermissibly relied on a prior pass-over in determining the level of management to endorse his officer effectiveness report. Pet. App. A10-A12. That contention is not before this Court.

its power to review the merits of petitioner Small's non-selection for promotion, *id.* at A15.

ARGUMENT

1. Petitioners argue (Pet. App. A13-A14, A16-A19, A22-A23) that the Air Force's use of panels violates 10 U.S.C. 616(c), which requires that an officer recommended for promotion receive the recommendation of a majority of the members of a selection board, and 10 U.S.C. 617(a), which requires the selection board to submit a list of the recommended officers to the Secretary concerned and certify that the board has carefully considered each officer's record and that a majority of the board agrees that the list of recommended officers are the best qualified for promotion. In petitioners' view, Sections 616(c) and 617(a) mandate that each board member consider every candidate's record after which the board must reach a majority consensus and certify that the recommended officers are the best qualified for promotion. Those contentions are incorrect, and do not warrant this Court's review.

Sections 616(c) and 617(a) "do not contain any specific methodology that the selection board must use in carrying out its deliberative process." Pet. App. A9. Similarly, "nothing in the plain language" of either statute "requires first-hand knowledge on the part of the deliberators of an officer's record. All that is required is a numerical showing that more than half of the board members approved or disapproved of the matter before them." *Ibid.* Accordingly, the court of appeals properly concluded that "[a] review of a selected number of individuals by sub-panels who use common and identifiable criteria is an efficacious and equitable means to establish the final rankings that are

in fact approved by a majority of the members of the board." *Id.* at A10.[4]

Moreover, 10 U.S.C. 615(b) specifically authorizes "the Secretary of the military department concerned" to furnish to a selection board "such * * * guidelines as may be necessary to enable the board to properly perform its functions." The court of appeals thus correctly concluded that the Air Force has the discretion to employ panels as an administrative mechanism through which a selection board conducts its deliberations and reaches its majority consensus.

Petitioners similarly are mistaken in contending (Pet. 20-21) that use of panels is inconsistent with the requirement under 10 U.S.C. 612(a)(3) that a selection board which considers a Reserve officer include at least one Reserve officer as a member. Petitioners are not Reserve officers, and they in any event do not contend that any selection board which failed to select them for promotion failed to have a Reserve officer as one of its members. As the legislative history of Section 612 makes clear, Congress "intend[ed] that the requirement for one [R]eserve member apply only to the selection board as a whole and not to each panel or other administrative subdivision" of the selection board. See *Fluellen* v. *United States*, No. 94-537C, 1999 WL 428037, at *8 (Fed. Cl. June 23, 1999) (citing H.R. Rep. No. 141, 97th Cong., 1st Sess. 12 (1981)).

2. Petitioners also argue (Pet. 25-27) that the use of panels conflicts with DoD Directive No. 1320.9 (Sept.

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[4] Petitioners contend (Pet. 6-7, 27-29) that the Air Force promotion system is inequitable. Apart from their contention that the Air Force's use of panels violates Sections 616(c) and 617(a), however, petitioners do not contend that any of their pass-overs violated any specific statute, regulation or other provision of law.

18, 1981), which provides that officers should be selected for promotion under a "centralized" system in which officers compete only against their peers. See also Pet. 21-22 (citing legislative history to 10 U.S.C. 621). Nothing in DoD Directive No. 1320.9, or any other provision of law, however, restricts the Air Force's ability to carry out a selection board's review of officers eligible for promotion through the use of panels. Petitioners moreover have adduced no evidence that any of them competed against any officers outside their competitive category. See, *e.g.*, Pet. App. A55.

3. Petitioners also challenge (Pet. 22-24) the practice whereby selection board panel members simultaneously register their approval or disapproval of the list of recommended officers and sign the board report to the Secretary that contains the requisite certification under Section 617(a). Neither Section 616 nor Section 617, however, prohibits that practice or even addresses the manner in which a selection board reaches its majority consensus or reports its majority findings. The court of appeals therefore correctly concluded that "using the signing of the Board Report as a means for the members to both express their approval of the recommended candidates and make the required certification is permissible under the statutory scheme." Pet. App. A10.

Contrary to petitioners' contention, the fact that a panel member's signature on the board's report reflects the member's approval of the list of recommended candidates does not result in the impermissible disclosure of the member's personal views and deliberations, in

violation of 10 U.S.C. 618(f).[5] The existence of each member's signature on the report merely reflects a final unanimous vote by the board that it considers the list of recommended candidates to be fully and best qualified for promotion. The report itself does not reflect any internal deliberations of the board.[6]

4. Petitioners further argue (Pet. 14-16) that the court of appeals violated their Due Process rights when the court failed explicitly to address their contention that panel members unlawfully sign the board's report under Section 617(a) "in blank" with no list of candidates attached. There is no basis for concluding, however, that the court of appeals did not consider petitioners' contention. As the court of appeals observed, petitioner raised many arguments, ranging "from issues regarding the policy of centralized review in the promotion process to basic principles of governing society." Pet. App. A10. The court of appeals explained that it "considered these arguments and [found] them unpersuasive." *Ibid.*

In any event, petitioners' underlying contention—that members may not sign a blank sheet of paper that is ultimately attached to the board's report—is without

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[5] Section 618(f) provides that "proceedings of a selection board * * * may not be disclosed to any person not a member of the board."

[6] Petitioners similarly err in suggesting (Pet. 24) that the use of panels is unworkable because a member's dissent as to the results of the selection process under Section 616(c) would result in the convening of a new selection board in order to obtain a unanimous board certification under Section 617(a). We are advised by the Air Force that a board member is permitted, next to his certification under Section 617(a), to register his disapproval, if any, of the slate of officers whom the Board ultimately will recommend for promotion.

merit. Section 617(a) requires the board to submit to the Secretary of the Air Force a report containing a list of recommended candidates, and petitioners do not contend that the prescribed list was not provided to Secretary along with the board's report. Nothing in the statute addresses, much less bars, a board member's executing his signature on a blank document to which the report, along with the list of candidates, is later attached.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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